



Via FOIAOnline.Regulations.gov

December 22, 2017

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer(s),

On behalf of the Environmental Working Group ("EWG") and the Center for Biological Diversity (the "Center" or, collectively with EWG, "Requesters"), we write to request that the Environmental Protection Agency ("EPA") disclose the following records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552:

Any and all records within the possession of the Stratospheric Protection Division of EPA's Office of Air and Radiation concerning the potential or actual effect of N₂O on the stratosphere, including stratospheric ozone.

Our request includes any written, recorded or graphic material that is in the Stratospheric Protection Division's possession, custody, or control, including electronic correspondence (*e.g.*, email in any form), facsimiles, forms, letters, memoranda, models, presentations, reports, studies, surveys and telegrams, as well as minutes, notes and transcripts of conferences, meetings, telephone calls and other communications.

REQUEST FOR FEE WAIVER

Requesters respectfully ask that EPA waive all fees incurred in connection with this request. As described below, Requesters meet FOIA's two-pronged test for service without charge.¹ Specifically, (1) disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the government's operations and

¹ See 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107 (2013).

activities with respect to analyzing the effects of N₂O emissions and considering methods to control those emissions and (2) disclosure is not in Requesters' commercial interest.

EWG is a 501(c)(3) not-for-profit watchdog organization that focuses on the environmental programs of the federal government. The Center is a 501(c)(3) not-for-profit corporation, working to protect the lands, waters, and climate that species need to survive. In pursuing their missions, Requesters seek to obtain and disseminate information about government actions and environmental issues to educate their members and the public at large.

FOIA carries a presumption of disclosure. According to the U.S. Court of Appeals for the D.C. Circuit, Congress amended the statute to include a fee-waiver provision "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests."² Similarly, the Ninth Circuit has explained that FOIA's fee-waiver provision operates "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waivers or reductions of fees."³ Thus, the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters."⁴

I. Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of government operations and activities.

A. The requested records concern "the operations or activities of the government."

Requesters seek records pertaining to EPA's analysis of N₂O, the dominant contributor to ozone destruction and a potent greenhouse gas. EPA's decisions to study (or not to study) and to regulate (or not to regulate) N₂O emissions are specific, identifiable actions of an executive agency of the government. Therefore, this request plainly concerns government operations or activities.

² *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93–94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)) (referring to requests from journalists, scholars and public interest groups); see also 132 Cong. Rec. S14298 (Sept. 20, 1986) (Sen. Leahy) ("[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....").

³ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298).

⁴ *Id.*

B. Disclosure of the requested records will “contribute significantly” to public understanding of government operations and activities.

The requested records will reveal the extent to which EPA has analyzed the risks to the stratosphere associated with N₂O emissions and, thus, will contribute significantly to public understanding of EPA’s approach to protecting public health and welfare by monitoring and preventing the destruction of stratospheric ozone. For example, responsive documents will demonstrate whether EPA considered recent scientific studies in deciding whether or not to regulate N₂O and, if so, which studies the agency found most compelling and/or what data the agency concluded was lacking. As noted above, experts agree that N₂O emissions contribute significantly to climate change and the destruction of stratospheric ozone, posing a serious threat to human health and the environment. Because of this threat, many members of the public are likely to be interested in information concerning the government’s efforts to study N₂O emissions and prevent associated harm. The records at issue will help Requesters, their members, and the general public evaluate the process by which EPA investigates potentially dangerous air emissions, as well as the agency’s compliance with applicable laws. For these reasons, disclosure is “likely to contribute significantly to public understanding of the operations and activities of the government.”⁵

According to the Ninth Circuit, “[FOIA’s] legislative history suggests that information [will contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....”⁶ In this instance, the requested documents are not otherwise readily available. Thus, disclosure will provide new information, significantly enhancing public understanding of EPA’s evaluation of the risk associated with N₂O emissions.⁷

⁵ 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2); *See W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (concluding that the requester “adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the [relevant agency] and also how . . . [the agency’s] management strategies . . . may adversely affect the environment”).

⁶ *McClellan Ecological Seepage Situation*, 835 F.2d at 1286.

⁷ *See W. Watersheds Project*, 318 F. Supp. 2d at 1040 (“[The requester] asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by [the relevant agency]. Therefore, the Court finds that [the requester] adequately demonstrated that the information would contribute to public understanding.”); *see also Cmty. Legal Servs., Inc. v. HUD*, 405 F. Supp. 2d 533, 558 (D. Pa. 2005) (“[T]he [FOIA] request would likely shed light on information that is new to the public.”).

C. Requesters will disseminate the requested records to the public.

In determining whether the disclosure of requested documents will contribute to public understanding, courts consider whether the requester will make the information contained in those documents available to a reasonably broad audience of interested persons.⁸ Requesters need not explain precisely how they intend to disseminate this information, in particular.⁹ Instead, it is sufficient to describe the process by which Requesters generally make information available to the public.¹⁰

For more than two decades, EWG has used FOIA to inform the public about operations and activities of the federal government. EWG has the ability to disseminate information through its website (<http://www.ewg.org>), which receives approximately 2.2 million visits and 10.7 million page views per month; alerts and actions to its more than 1.2 million member e-mail list; blogs, specifically, “AgMag” (<http://www.ewg.org/agmag>) and “EnviroBlog” (<http://www.ewg.org/enviroblog>), which draw thousands of visits and page views per month; EWG’s agriculture-focused policy newsletter “Policy Plate”; posts to its Facebook page (<https://www.facebook.com/ewg.org>), which has more than 200,000 fans; and through updates to its more than 31,000 Twitter followers (<https://twitter.com/ewgtoxics> and <https://twitter.com/ewgfoodnews>). EWG employees also disseminate information to the public on radio and television broadcasts and through congressional testimony, comments to federal agencies, and, where necessary, through the judicial system. In addition, EWG regularly communicates to the media about its work through media alerts, press releases, interviews, and press conferences. EWG is unquestionably capable of reaching a nationwide audience with each of our reports and underlying analyses. Accordingly, EWG can demonstrate beyond question that information requests are likely to contribute significantly to the public’s understanding of government activities and operations.

The Center’s work appears in well over 2,000 news stories in print, radio, and TV each month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. In 2016, more than 2 million people visited the Center’s extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email

⁸ As described below, Requesters regularly disseminate information to a far larger audience than is required to justify a fee waiver. *See, e.g., Cmty. Legal Servs.*, 405 F. Supp. 2d at 557 (granting fee waiver even though the requester was “unlikely to reach a very general audience,” there was “a segment of public that is interested in [requester’s] work”).

⁹ *See Judicial Watch*, 326 F.2d at 1314 (“Nothing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.”).

¹⁰ *Id.*

newsletters and action alerts per year to more than 1.5 million members and supporters. Three times a year, the Center sends printed newsletters to more than 61,443 members. More than 259,900 people have “liked” the Center on Facebook. The Center regularly tweets to more than 55,000 followers on Twitter. Federal courts have recognized that these and similar distribution activities are likely to contribute to public understanding of government activities and operations.¹¹ The Center intends to use any or all of these far-reaching outlets to share with the public information obtained as a result of this request.

The public is entitled to oversee the activities of government agencies, especially in legally and ethically complicated situations.¹² The requested documents will contribute to public understanding of EPA’s approach to evaluating and regulating N₂O emissions, which are generated in part by politically powerful members of the agricultural industry. Because the documents at issue are not readily available to the public, disclosure and dissemination will contribute to greater understanding of the factors influencing EPA’s decision to study (or not to study) and to regulate (or not to regulate) N₂O emissions.

II. The requested information is of no commercial interest to Requesters.

Obtaining access to government documents and similar materials under FOIA is essential to Requesters’ goals of educating the public. As not-for-profit organizations, Requesters have no commercial interest and will realize no commercial benefit from the release of the requested information.

We hope this letter has demonstrated to your satisfaction that Requesters qualify for a full fee waiver. Please do not hesitate to contact us if you have any questions about the scope of this request or if you wish to discuss opportunities to expedite and simplify your efforts to comply. Please send all materials, in text-searchable electronic form, to the address below within the

¹¹ See, e.g., *Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) (“Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public’s understanding of the BLM’s operations and activities.”).

¹² See *Judicial Watch*, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

timeline required by FOIA. If you determine that Requesters do not merit a fee waiver, please contact us before incurring costs in excess of \$25.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alexis Andiman', with a horizontal line extending from the end of the signature.

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